Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-7 OF 1998(J)
ABDUL MALEK AHMAD FCJ
14 MAY 2002

Civil Procedure *— Costs — Getting up fee — Application to review the quantum awarded — Whether there was an error of principle on the part of the taxing registrar in fixing the amount — Whether the quantum awarded for getting up should be confirmed*

This was an application to the judge in chambers by the respondents (who were the plaintiffs in the High Court and the respondents in the Court of Appeal), to review the decision of the deputy registrar in awarding RM40,000 as getting up fees for an appeal in the Court of Appeal under O 59 r 36 of the Rules of the High Court 1980 ('the RHC'). The deputy registrar had dismissed the application to review his own decision under O 59 r 34 of the RHC because: (a) the amount awarded was fair and reasonable; (b) even though the case involved a novel point as regards the aboriginal peoples' rights over land the matter was not complex and counsel for the respondents took only ten minutes to submit at the appeal; (c) the Federal Court had dismissed the appeal immediately without giving any written judgment; (d) the uphill task was on the appellants; (e) the respondents were entitled to higher getting up in the court of first instance; (f) even though the total compensation awarded to the respondents came to over RM2.6m, each of the 52 respondents was only entitled to about RM500,000; and (g) of the various case laws cited and the principles as set out in sub-para (2) of para 1 of Part X of Appendix 1 of O 59 of the RHC.

Held, dismissing the respondents' application:

(1) Since the review was only in respect of the quantum of the costs awarded for the getting up, the quantum should not be changed unless there was an error of principle on the part of the taxing registrar in fixing the amount. In the instant case, the major preparations by the respondents' counsel would have been at the High Court level and since the respondents were successful at both the High Court and the Court of Appeal levels, there was not much for their counsel to prepare for the Federal Court appeal. In these circumstances, the quantum of RM40,00 for getting up was confirmed (see p 712B–D).

(2) Further, interest should also be awarded although not specifically claimed and in this regard, there should be another item added in the registrar's certificate to provide for interest at eight percent per annum on the costs awarded from the date of the judgment of the appeal in the Federal Court on 21 March 2000 up to the date of

realization (see pp 712D, 713B–C); *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583 followed.

[Bahasa Malaysia summary

Ini merupakan satu permohonan kepada hakim dalam kamar oleh penentang-penentang (yang merupakan plantif-plaintif di Mahkamah Tinggi dan penentang-penentang di Mahkamah Rayuan), untuk mengkaji semula keputusan timbalan pendaftar dalam mengawardkan RM40,000 sebagai yuran persediaan untuk suatu rayuan di Mahkamah Rayuan di bawah A 59 k 36 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Timbalan pendaftar telah menolak permohonan untuk mengkaji semula keputusan sendiri di bawah A 59 k 34 KMT disebabkan: (a) jumlah yang diawardkan adalah adil dan munasabah; (b) walaupun kes membabitkan hujah baru mengenai hak orang asli atas tanah, perkara tersebut tidak kompleks dan peguam untuk penentang-penentang hanya mengambil 10 minit untuk berhujah di rayuan; (c) Mahkamah Persekutuan telah menolak rayuan serta-merta tanpa memberi apa-apa penghakiman bertulis; (d) tugas yang rumit terletak dengan perayu-perayu; (e) penentang-penentang berhak menerima yuran persediaan yang lebih tinggi di mahkamah pertama; (f) walaupun jumlah pampasan yang diawardkan kepada penentang-penentang melebihi RM2.6 juta, setiap satu daripada 52 penentang cuma berhak menerima kira-kira RM500,000; dan (g) pelbagai nas-nas yang disebut dan prisnip-prinsip seperti yang dinyatakan dalam perenggan kecil (2) perenggan 1 Bahagian X Lampiran 1 A 59 KMT.

Diputuskan, menolak permohonan-permohonan penentang:

(1) Oleh kerana kajian semula cuma berkaitan kuantum kos yang diawardkan untuk persediaan, kuantum tidak harus ditukar melainkan terdapat kesilapan dari segi prinsip oleh pihak pendaftar pencukaian dalam menetap jumlah. Dalam kes ini, persediaan utama oleh peguam penentang-penentang seharusnya berlaku di tahap Mahkamah Tinggi dan oleh kerana penentang-penentang berjaya di kedua-dua tahap Mahkamah Tinggi dan Mahkamah Rayuan, peguam mereka tidak perlu membuat persediaan yang begitu banyak untuk rayuan di Mahkamah Persekutuan. Dalam keadaan demikian, kuantum sebanyak RM40,000 untuk persediaan disahkan (lihat ms 712B–D).

(2) Selanjutnya, faedah harus juga diawardkan walaupun tidak dituntut secara khusus dan berhubung perkara ini, satu lagi butir harus ditambahkan kepada sijil pendaftar untuk memperuntukkan faedah pada kadar lapan peratus setahun atas kos yang diawardkan dari tarikh penghakiman rayuan di Mahkamah Rayuan pada 21 Mac 2000 sehingga tarikh realisasi

A (lihat ms 712D, 713B–C); *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583 diikut.]

Notes

B For cases on getting up fees, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1637–1650.

Cases referred to

Bar Council v Dato V Kanagalingam [2000] 3 AMR 3383 (refd)
C *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292 (refd)
Chan Kok Choon JP v MBf Finance Bhd [2001] 1 MLJ 5 (refd)
Gooi Hock Seng v Chuah Guat Khim [2001] 1 CLJ 583 (folld)
Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd [1999] 2 MLJ 374 (refd)
D *Property & Reversionary Investment Corp Ltd v Secretary of State of the Environment* [1975] 2 All ER 436 (refd)
Toe Soh Lung v The Minister of Home Affairs & 2 Ors [1992] 2 CLJ 943 (refd)
Vincent Cheng Kim Chuan v The Minister for Home Affairs & Ors [1992] 2 CLJ 945 (refd)
E *Welltrade Middle East Ltd & Anor v PJ Wakelin & Ors* [1984] 1 MLJ 1xiv (refd)
Yii Suok Ting v Sibu Municipal Council [1995] 4 CLJ 108 (refd)

F **Legislation referred to**

Aboriginal Peoples Act 1954
Rules of the High Court 1980 O 59 r 36, O 59 para 1 of Part X of Appendix 1

S Kanawagi (*Khana & Co*) for the respondents.
G *Iskandar Ali Dewa* (Assistant State Legal Adviser, Johor) for the appellants.

Abdul Malek Ahmad FCJ: This is an application to the judge in chambers by the 52 respondents, who were the plaintiffs in the High Court and the respondents in the Court of Appeal, to review the decision of the H learned deputy registrar in awarding RM40,000 for the getting up fee for the appeal in this court under O 59 r 36 of the Rules of the High Court 1980 ('the RHC'). They are also applying for interest to be awarded on that amount.

Learned counsel for the respondents, S Kanawagi, conceded at the I outset that the amount of RM2.6m which they had asked for initially was far too excessive but contended that the RM40,000 awarded was manifestly low.

The learned deputy registrar had dismissed the application to review his own decision under O 59 r 34 of the RHC based on the following grounds: A

(a) he found that the amount was fair and reasonable in the circumstances;

(b) even though the case involved a novel point as regards the aboriginal peoples' rights over land, the matter was not complex; B

(c) learned counsel for the respondents took only ten minutes to submit at the appeal;

(d) the Federal Court dismissed the appeal immediately without giving any written judgment;

(e) the uphill task was on the appellants; C

(f) the respondents who were the plaintiffs in the High Court are entitled to higher getting up in the court of first instance;

(g) even though the total compensation awarded to the respondents came to over RM2.6m, each of the fifty two respondents was only entitled to about RM500,000; D

(h) the various case laws cited; and

(i) the principles as set out in sub-para (2) of para 1 of Part X of Appendix 1 of O 59 of the RHC which state:

> (2) In exercising his discretion under this paragraph or under r 31(2) in relation to any item, the Registrar shall have regard to all relevant circumstances, and in particular to: E
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> (a) the complexity of the item or the cause or matter in which it arises and the difficulty or novelty of the questions involved;
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> (b) the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel; F
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> (c) the number and importance of the documents (however brief) prepared or perused;
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> (d) the place and circumstances in which the business involved is transacted;
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> (e) the importance of the cause or matter to the client; G
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> (f) where money or property is involved, its amount or value;
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> (g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question. H

Learned counsel disagreed that the matter at hand was not complex. He argued that there were multiple new issues on the deprivation of livelihood which affected constitutional law. These could only be found in employment contracts as there was no local case law affecting the orang asli or aborigines. I

Learned counsel added that the rights of the orang asli had been set out in the Aboriginal Peoples Act 1954 but their common law rights was an

A entirely new area which, coupled with their constitutional rights, required extensive research of the rights of the aborigines in other Commonwealth countries like Australia and New Zealand where the law is quite developed. For the Federal Court appeal alone, he said, seven bundles of authorities were prepared.

B He submitted that getting up was not based on time taken in court nor is the fact that there were no written grounds of judgment a point to be considered. Nor is the division of the amount awarded for the claim, he reiterated, a relevant factor.

Reference was made to a number of authorities namely:

C (a) *Welltrade Middle East Ltd & Anor v PJ Wakelin & Ors* [1984] 1 MLJ lxiv, where the learned deputy registrar held that the interim injunction was not one of the ordinary run of the mill injunctions as any person perusing the voluminous affidavits and documents will appreciate the complex and technical nature of the injunction, the getting up awarded was SGD 22,000 which amount was affirmed on D review by the judge;

(b) *Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292, where RM12,500 was awarded on review from RM2,000 although the taxing party had initially asked for RM15,000 — the review judge considered running down cases to be the simplest E of cases and he held that there should be a gradual scaling upwards of costs for getting up for more complicated and not so common cases;

(c) *Teo Soh Lung v The Minister of Home Affairs & 2 Ors* [1992] 2 CLJ 943, which was an application for habeas corpus, the getting up award was reduced to SGD30,000 from SGD50,000 and this was affirmed by the judge on review;

F (d) *Vincent Cheng Kim Chuan v The Minister for Home Affairs & 2 Ors* [1992] 2 CLJ 945, also a habeas corpus case in Singapore where the proceedings lasted five days, the getting up fee of SDG 65,000 and SGD 4,000 respectively was affirmed on review;

(e) *Yii Suok Ting v Sibu Municipal Council* [1995] 4 CLJ 108, which had G lengthy submissions, six bundles of authorities, ten affidavits and argued over three days, the getting up fee awarded was RM30,000 despite the judge on review holding that it was not an easy case with complicated issues of facts and law;

(f) *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] H 2 MLJ 374, where the compensation for the compulsory acquisition of the land resulted in a gain of more than RM18 million to the respondent, a getting up fee of RM40,000 was affirmed on review; and

(g) *Bar Council v Dato V Kanagalingam* [2000] 3 AMR 3383, the getting up fee was reduced from RM600,000 to RM120,000 as the judge on I review held that the sum awarded by the taxing registrar was exceedingly high and out of proportion to the magnitude and complexity of the case although the instant case was a matter of

considerable importance as the livelihood and professional reputation of the respondent was in jeopardy. A

In the event, learned counsel asked for the getting up fee to be increased to RM132,500 which represents a half percent of the judgment sum of RM26.5m. He also asked for interest to be awarded at eight percent per annum on that amount from 21 March 2000 which was the date of hearing of the appeal in the Federal Court. Lastly, he asked for RM600 as costs of the day. B

Iskandar Ali Dewa, the Assistant State Legal Adviser for Johor, for the appellants in the Federal Court appeal, submitted that there was no error committed by the deputy registrar in exercising his discretion. He argued that an error on principle must first be shown before a judge on review can alter the registrar's certificate. He added that all facts had been taken into consideration and they were not in dispute. The relevant research, he continued, should have been done at the High Court level. C

Interest was not claimed and it was his view that it should not be allowed as it was not in issue. As for the costs of the day, he reminded learned counsel that he had asked for RM500 for the earlier application by learned counsel for a postponement but was only granted RM250. D

As for the getting up fee, in *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583, I had said:

It was held (in *Coon v Diamond Tread Co* (1938) Ltd [1950] All ER Vol 2 385) that as the complaint went to quantum only, it had not been shown that the taxing master had erred on a question of principles and therefore the court had no jurisdiction to interfere with his decision. E

At p 387 of the judgment, Wynn-Parry J said:

'The law to be applied in such a case as this is conveniently stated by the Court of Appeal in *Re Ogilvie* (1910) P 243. In the course of his judgment Cozens-Hardy MR, said at p 244): F

"It is of extreme importance that there should be no doubt as to the general rule on this subject."

He then quoted with approval from the judgment of Sir John Leach MR, in *Alsop v Oxford (Lord)* [1833] 1 My & K 564, where Sir John Leach MR, said (1 My & K 566): G

"Generally speaking, the decision of the master on taxation is final: he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it: and it is further his duty to inquire whether the business was required to be done: for, if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the master to protect the client from any charge in respect of such proceedings. The court will only interfere where the master acts upon some mistaken principle." H

After referring to the later case of *Re Catlin* (1854) 18 Beav 508, Cozens-Hardy MR, continued ([1910] p 244): I

"I should be very sorry if any doubt were cast on that, for I can scarcely imagine a tribunal more unfit than a judge of the High Court to deal with questions of *quantum* on the taxation of costs. The taxing

A master is the person whose duty it is to decide questions of *quantum*, and it is not right for the judge to interfere in such a matter. If a question of principle arises, no doubt the court ought to interfere and consider and if necessary correct the view taken by the taxing master."

Buckley LJ said (ibid, 245):

B "On questions of *quantum* the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of *quantum* the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shown to have C gone wholly wrong. If a question of principle is involved it is different: on a mere question of *quantum* in the absence of particular circumstances the decision of the taxing master is conclusive." '

In *Gorfin v Odhams Press Ltd* [1958] 1 WLR 314, it was held that notwithstanding the terms of the relevant provision to review, in practice the court will only interfere with the exercise of the taxing officer's discretion if it D is clear that he has gone wrong in principle, and for that reason matters of quantum only, where no principle is involved, are rarely interfered with but where a question of principle is involved and if it can be shown that the taxing officer has erred in principle, the court would exercise its own discretion.

E In *Property & Reversionary Investment Corp Ltd v Secretary of State of the Environment* [1975] 2 All ER 436, at p 441, Donaldson J (as he then was) observed on the difficult matter of assessment as follows:

It is an exercise in assessment, an exercise in balanced judgment — not an arithmetical calculation. It follows that different people may reach different conclusions as to what sum is fair and reasonable, although all should fall F within a bracket which, in the vast majority of cases, will be narrow.

The Court of Appeal in *Chan Kok Choon JP v MBf Finance Bhd* [2001] 1 MLJ 5 said at pp 7–8:

In *Lloyds Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127, Chong G Siew Fai J (as he then was) held that generally speaking the discretion of the taxing officer on quantum will not be interfered with.

In the present appeal we are of the view that the learned judge committed this grave error when he treated the review as an appeal. A perusal of his judgment bears testimony to that. In a number of places in his judgment the learned judge referred to the review before him as an appeal and he ended by H holding that he allowed 'the appeal with costs'. For the learned judge to interfere there must be some error of principle or some other material error. We can find no such errors in this appeal. The learned judge, therefore, should not have disturbed the finding of the registrar. The learned registrar gave his written grounds for reducing the getting up fee to RM14,000 and on going through the grounds, we find that he had applied the correct principles in arriving at that figure. The learned judge however, made no reference at all to I these principles. The principles adopted by the registrar are spelt out in Appendix I Part X of O 59 and therefore, there is no need to look elsewhere. We are of the view that the learned judge fell into error when he relied on the

> decision in *JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors* [1994] 1 MLJ 47 in defence to the guidelines provided by O 59. That decision ought not to be applied because that was a decision based on a successful O 14 matter, whereas in the present appeal the costs were ordered for the discontinuance of the whole proceeding. He committed yet another error when he treated this matter as a concluded O 14 application. In the light of these errors we allow the appeal with costs here and below. We set aside the learned judge's decision and restore the order of the registrar. We also order the deposit to be refunded to the appellant.

Since the review is only as regards the quantum of the costs for the getting up, the authorities dictate that it should not be changed unless there is an error of principle on the part of the taxing registrar in fixing the amount. Here, despite the persuasive submission of learned counsel for the taxing party, I find that the major preparations by learned counsel would have been at the High Court level and since the taxing party was successful at both the High Court and the Court of Appeal levels, there is really nothing much for them to prepare for the Federal Court appeal. In these circumstances, and guided by the authorities, the quantum of RM40,000 for getting up is confirmed.

However, I find that interest should also be awarded although not specifically claimed. Again, I refer to *Gooi Hock Seng v Chuah Guat Khim* where I had said:

> However, as for the second item, which was the interest on costs, the learned registrar had said that learned counsel for the applicant/respondent had not impressed her that the order of costs was a judgment debt under O 42 r 12 of the Rules [the Rules of the High Court 1980], that the application for interest on costs cannot be made at the taxation proceedings as no costs are awarded at that stage, and that she was not bound by any other award of taxed costs.
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> In *Halsbury's Laws of England* vol 37 at p 581 para 753 reads:
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> > 'Notwithstanding that orders for costs have the same effect as judgments and that judgment debts carry interest from the date of entering up the judgment, the modern practice, based on the principle that interest cannot run until payment is wrongfully withheld and that payment cannot be wrongfully withheld until a party knows what he has to pay, is that interest on costs runs from the date of the taxing officer's certificate quantifying the costs or from such other date as may be ordered as the date on which payment is to be made.'
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> In *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276, the Federal Court had ruled that upon a true construction of O 40 r 11(2) of the Rules, interest is payable where an order directs payment of costs to be taxed, and a judgment for damages to be assessed, or for costs to be taxed, carries interest from the date of entry of judgment and not from the date assessment or taxation.
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> This was followed by the High Court in *Sam Hock Ming v Hong Leong Assurance Sdn Bhd* Civil Suit NO 23–113–86 High Court Ipoh which held that as to whether interest should run from the date when an order for costs was made or from the date of allocatur in respect of such costs, the court took the view that a judgment for damages to be assessed or for costs to be taxed, carried interest from the date of the said judgment and not from the date of assessment of damages or taxation of costs.

A As stated in footnote 5 of the Halsbury's text referred earlier, *Pyman & Co v Burt and Bolton* [1884] WN 100 and *Landowners' West of England and South Wales Land Drainage and Inclosure Co v Ashford* [1884] 33 WR 41, were overruled by *K v K* [1977] Fam 39, [1977] 1 All ER 567 (CA) and *Eryen Warnink Besloten Vernoostchap v J Townsend & Sons (Hull) Ltd* [1981] 125 Sol Jo 427 but these in turn have now been overruled by *Hunt v RM Douglas* B *(Roofing) Ltd* [1988] 3 All ER 823 which held that a litigant who has been awarded costs is entitled to interest on those costs from the date of judgment rather than the date the taxation of costs is completed.

Accordingly, I hold that there should be another item added in the registrar's certificate to provide for interest at eight percent per annum on the costs awarded from the date of the judgment of the appeal in the Federal C Court on 21 March 2000 up to the date of realization.

In these circumstances, each party is to bear their own costs.

Respondent's application dismissed.

D Reported by Lim Lee Na

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